No. 16,405

United States Court of Appeals

For the Ninth Circuit

TRAVIS BUFORD,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF.

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THE FACTS.

In responding to the brief for appellee, appellant is first desirous of commenting on the statement of facts contained in its brief.

Appellee does not point out or even mention that no officer was familiar with the voice that was heard over the transmitter, nor that five or six other persons were in the shop when appellant was assumed to have spoken the words described by Agent Yannello, nor that Agent Walker did not know whether any of the five or six persons in the shop used their voice. He did not hear the informer say anything preceding the words attributed to appellant: "I'll be with you in just a minute, just as soon as I finish this process job."[1] (TR 37, 44-45.)

[1]As a result, no one can say with reasonable clarity that the foregoing remark was in answer to the informer or that the words were directed to her.

Neither has the court's attention been called to the fact that Agent Walker referred to appellant Buford as Turner. (The other defendant.) (TR 37, 38.)[2]

ARGUMENT.

THE CONSPIRACY.

Appellee charges that appellant's argument that no illegal conspiracy has been entered borders upon the frivolous. (Appellee's Brief, 5.)

The conspiracy charged in the indictment (TR 4) is that Teresa Turner and Travis Buford with other unknown persons at an unknown time agreed to unlawfully sell, dispense, and distribute not in and from the original stamped package a certain quantity of a narcotic drug, to-wit: cocaine hydrochloride. The fact that the informer was not named in the indictment does not negate the proof, which very clearly points to her as the conspirator, and not Teresa Turner. The government's own witness introduced the evidence at TR 8: "A voice answered: 'If you don't let me in and give me some, I'm going to tell your old man what you're doing.' " These very words indicate that the speaker was not a part of any conspiracy. Should the government now take the position that there is no proof these words were uttered by Teresa Turner, then their entire case falls on that point alone. On the other hand, if the government insists that Teresa Turner was the utterer, these words indicate she may

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[2]The importance of the above factors is that, under the circumstances, the trial Court's rulings overruling appellant's objections to the alleged conversation as hearsay were incorrect at the time, and this prejudiced her entire defense.

have suspected what the informer and Travis Buford were doing, but she was prepared to inform on them unless she was given some. This, certainly, does not indicate a conspiracy between Travis and Teresa. Rather, does it point to a conspiracy between Travis and the informer. Since such a conspiracy cannot be prosecuted as unlawful because one of the conspirators was a government agent, appellant's insistence that no unlawful conspiracy was proved is not frivolous.

Williams v. State, 55 Ga. 391;

Price v. People, 109 Ill. 109;

People v. Goldberg, 152 Cal. App. (2d) 562, 314 Pac. (2d) 151 at 158.

THE SUBSTANTIVE COUNTS WERE PROVED SOLELY BY EXTRAJUDICIAL WORDS OUT OF THE MOUTH OF APPELLANT.

Appellee concedes it would have to confess error if it were solely a matter of a recognition of the voice of appellant. (Appellee's Brief, 6.)

In the absence of any other proof of the corpus there could not be a conviction. True, the law in federal jurisdictions states the rule differently, but the meaning is still the same. It seems to be the federal rule that a case cannot be proved solely by the extrajudicial statements of the defendant, and makes no reference to the "independent proof of the corpus delicti".

Vinkemulder v. United States (C.C.A. 5th), 64 Fed. (2d) 535, (cert. den.), 290 U.S. 666, 78 L. Ed. 576, 54 S. Ct. 87;

Flower v. United States (C.C.A. 5th), 116 Fed. 241;

Wiggins v. United States (C.C.A. 9th), 64 Fed. (2d) 950 (cert. den.), 290 U.S. 657, 78 L. Ed. 569, 54 S. Ct. 72.

Under this heading in its brief appellee claims that appellant admitted the violations. This is not the fact—the fact being only that she admitted the conversations as heard on the transmitter. This, appellant submits, is considerably different from admitting the violations. There can be no question that it is the law that a person is presumed to be innocent and not presumed to be guilty. If the fact of such conversations can be given an innocent interpretation, even though it can also be given a guilty interpretation, the trier of the facts is bound to accept the innocent interpretation.

United States v. Gasmiser Corporation (1948), 7 F.R.D. 712 at 714;

United States v. Lattman, (3 Cir. 1945), 152 Fed. (2d) 393, 394;

United States v. Thatcher (3 Cir.), 131 Fed. (2d) 1002, 1003;

United States v. Russo (3 Cir. 1941), 123 Fed. (2d) 420, 423;

Paul v. United States (3 Cir.), 79 Fed. (2d) 561, 563;

Wright v. U. S. (8 Cir. 1915), 227 Fed. 855, 857

and a great many others.

Appellant points out that this statement admitting the conversations over the transmitter is only a circumstance—it is not direct proof. The appellant could have had these conversations with Malvina Webb and meant something entirely innocent—she might have intended to mislead the informer, a customer of her barber shop, merely in order to appear to acquiesce rather than to engage in a controversy. Suffice to say, her words over the transmitter could have meant a multitude of things other than an agreement to actually dispense narcotics.

CONCLUSION.

Since the government for some reason did not produce the only witness who could have proved or disproved the crime alleged, it is respectfully urged that an admission by appellant that she engaged in certain conversations is indeed a slim chain of evidence required to be sufficient to convict beyond a reasonable doubt, particularly where the Court erroneously admitted evidence which otherwise might not have contributed to the case, deficient as it is.

Dated, San Francisco, California,
July 29, 1959.

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